Ref. No. 321

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324a Proceeding
v.	)	CASE NO. 90100286
GOLDENFIELD CORPORATION, DBA RODEWAY INN, PUEBLO, COLORADO, Respondent.	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Procedural History

On September 17, 1990, the Immigration and Naturalization Service (hereinafter "Complainant") filed a Complaint with the Office of Chief Administrative Hearing Officer charging Respondent, Goldenfield Corporation, with twenty-six (26) violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act (hereinafter "the Act"), 8 U.S.C. § 1324a(a)(1)(B).

Respondent filed its Answer on October 25, 1990, gene denying the allegations of the Complaint.

Complainant thereafter filed a Motion f pursuant to 28 C.F.R. section 68.36, that no genuine issue of material fact exists concerning the liability of Respondent or the penalty to be imposed on Respondent for violations of Section 274A(a)(1)(B).

On January 22, 1991, an order was issued directing Respondent to file a response to Complainant's Motion for Summary Decision on or before February 18, 1991.

On February 15, 1991, Respondent filed a Motion for Enlargement of Time, seeking additional time in which to respond to Complainant's Motion for Summary Decision. On the same date, an order issued granting Respondent's motion and directing Respondent to file its response on or before March 18, 1991.

Respondent filed its Opposition to Motion for Summary Decision and Motion for Summary Decision and for Dismissal of the

Complaint on March 18, 1991. Respondent argues in its Opposition and Motion for Summary Decision that Complainant's Motion for Summary Decision should be denied, or that summary decision should be granted in favor of Respondent, on the following grounds: (1) Complainant failed to send Respondent a three day written notice of inspection; (2) "The I-9 form is not a form designated or established by the Attorney General as is required by 8 U.S.C. section 1324a(b)(1)(A);" (3) Neither the Act nor the regulations require an employer to check the boxes on the Form I-9; (4) Respondent "substantially complied" with IRCA's employment verification requirements by retaining copies of its employees' documents; (5) Four of the individuals named in the Complaint are "grandfathered" employees; (6) Respondent made a good faith effort to comply with IRCA's employment verification requirements; and (7) Complainant does not sufficiently address the issue of mitigation of penalty in its Motion for Summary Decision.

On March 25, 1991, Complainant filed its Response to Respondent's Opposition to the Motion for Summary Decision. In its Response, Complainant argues that, with the exception of Respondent's alleged "grandfather" defense, the "defenses" alleged by Respondent in its Opposition do not constitute affirmative defenses to violations of Section 274A(a)(1)(B); therefore, genuine issues of material fact with respect to liability only exist as to the four individuals Respondent claims are "grandfathered." In addition, Respondent has failed to show that genuine issues of material fact exist with regard to the assessment of civil penalty.

II. Statement of Facts

Respondent assumed ownership and control of a motel and restaurant previously known as the Pueblo Rodeway Inn on May 29, 1990. The business is now known as the Hotel Pueblo.

A Notice of Inspection was mailed to Respondent's predecessor, Rodeway Inn, on May 14, 1990, return receipt requested. The notice informed Respondent's predecessor that an inspection of Forms I-9 was to be conducted on June 5, 1990.

Between June 1, 1990 and June 5, 1990, Joan Brandon, resident
[illegible] the Respondent's business, called INS Agent Rollie
e inspection of Respondent's Forms I-9
:r date. Ms. Brandon's request was
was rescheduled for July 3, 1990.
resident manager of the business for
interest; she retained her position
rship and control on May 29, 1990.

the inspection of Respondent's Forms
scheduled. Thereafter, Complainant
ɔ Fine on July 12, 1990, based on the

violations of IRCA's employment verification requirements discovered during the July 3, 1990 inspection of Respondent's Forms I-9.

III. Legal Standards in a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. section 68.36 (emphasis added); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); see also, Consolidated Oil & Gas Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

In other words, summary decision will be granted only if the record, when viewed in its entirety, is devoid of a genuine issue as to any fact that is outcome determinative. See Anderson v. Liberty Lobby, Inc., supra; see also, Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 480 ("An issue is not material simply because it may affect the outcome. It is material only if it must inevitably be decided."). A fact is "outcome determinative" if the resolution of the fact will establish or eliminate a claim or defense; if the fact is determinative of an issue to be tried, its is "material." Id.

Rule 56(c) of the Federal Rules of Civil Procedure also permits, as the basis for summary decision adjudications, consideration of any "admissions on file." A summary decision may be based on a matter deemed admitted. See e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982); see also, Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) ("If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted."); and U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact.).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.8(c)(1). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (". . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment."); see also, Freed v. Plastic Packaging Mat., Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardist, 262 F.2d (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

Finally, in analyzing the application of summary judgment/summary decision in administrative proceedings, the Supreme Court has held that the pertinent regulations must be "particularized" in order to cut off an applicant's hearing rights. See Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) (". . . the standard of 'well controlled investigations' particularized by the regulations is a protective measure designed to ferret out . . . reliable evidence . . . .").

IV. Findings of Fact and Conclusions of Law

A. Service of Three Day Notice of Inspection

Respondent argues that Complainant cannot prosecute this matter because it failed to send a three day notice to Respondent of its intent to inspect employee records as is required by law. Respondent's argument appears to be based upon the fact that, although Complainant sent a written Notice of Inspection to the business on May 14, 1990, Complainant did not send a new Notice of Inspection to the business when Respondent assumed control approximately two weeks later.

Respondent's argument lacks merit for two reasons. First, it has previously been held that the three day notice requirement
.F.R. section 274a.2(b)(2)(ii) is not a
ement which must be provided in support of
rather, it is merely a protection an
of inspection. United States v.
)111 (May 4, 1989) (Order For
.so, U.S. v. Big Bear Mkt., OCAHO
989) (It is not reasonable to
failure to provide notice in
ights of employers.). Second,
(30) days actual notice of the
Brandon.

noted in its Response to
dent does not identify any harm
ged improper service." Respondent
iled to provide Respondent with a
n. As the cases cited above

indicate, the failure to provide written notice, without more, does not impair Respondent's substantive rights. Thus, I find that Respondent's substantive rights were not impaired as a result of Complainant's failure to issue a new Notice of Inspection to Respondent when it assumed ownership and control of the business on May 29, 1990.

Furthermore, the regulatory purposes of 8 C.F.R. section 274a(b)(2)(ii), which provides, in pertinent part, that "[a]ny person or entity required to retain Forms I-9 . . . shall be provided with at least three days notice prior to an inspection of the Forms . . .," were satisfied since Respondent, through its agent Joan Brandon, had actual notice of the inspection of Forms I-9. Respondent's resident manager, Ms. Brandon, was aware of the original date on which the inspection was to be conducted, and called INS Agent Clark to request that the inspection be rescheduled for a later date. Agent Clark granted Ms. Brandon's request, the inspection was rescheduled, and then conducted without any objection from Respondent. See U.S. v. Manos & Associates, OCAHO Case No. 89100130 (February 8, 1989) (Order Granting In Part Complainant's Motion for Summary Decision) (The written notice of inspection in conjunction with oral discussion regarding re-visitation by INS agents at a time subsequent provided adequate notice, and was not a reason to preclude summary decision.); see also, U.S. v. Vanounou, supra.

I agree with Complainant that, "[u]nder the circumstances presented in this case, the Respondent cannot now complain that the notice and audit, for which a new date was requested and agreed to by its own agent, was improper." Therefore, I find that Respondent's argument that it did not receive proper notice of inspection does not constitute an affirmative defense to the allegations of the Complaint, and does not raise genuine issues of material fact.

B. Whether the Form I-9 is a form designated by the At General as required by 8 U.S.C. section 1324a(b)(1)(A)

Respondent argues in its Opposition/Motion f Decision that "[t]he I-9 form is not a f established by the Attorney Genera section 1324(B)(1)(a) (sic)." Fc find Respondent's argument that merit, and thus fails to raise a

Respondent correctly notes (1)(A) of the Immigration and Na in pertinent part, that "[t]he under penalty of perjury and on by the Attorney General by regul the individual is not an unauth added.)

However, Respondent erroneously concludes that, since 8 C.F.R. section 299.5 states that "[t]he Information collection requirements contained in this title have been approved by the Office of Management and Budget (OMB)" (i.e. the Form I-9), the Form I-9 is not a form "designated or established by the Attorney General by regulation . . . ."

IRCA implementing regulation 8 C.F.R. section 274a.2(a) states, in pertinent part, that "[t]he Form I-9, . . ., has been designated by the [Immigration and Naturalization] Service as the form to be used in complying with the requirements of this section." Further, 8 C.F.R. section 2.1 states, in pertinent part, that "there is delegated to the Commissioner [of the Immigration and Naturalization Service] the authority of the Attorney General to direct the administration of the Service and to enforce the Act . . . "; and the Commissioner "may redelegate any such authority to any officer or employee of the Service." See also 8 C.F.R. section 100.2. Thus, it is clear from our regulations that the Form I-9 is indeed a form designated by the Attorney General, as required by 8 U.S.C. section 1324a(b)(1)(A).

C. Whether an employer is required to check the boxes and insert document information in Section 2 of the Form I-9

Respondent next contends in its Opposition that, "[a]ssuming arguendo that Form I-9 is a form validly adopted by the Attorney General, nothing in the regulation found at 8 C.F.R. section 274a(b)(ii)(B) (sic) requires an employer to check boxes on the form. Similarly, nothing in . . . 8 U.S.C. section 1324(b) (sic) requires an employer to check boxes." I find, for the reasons stated below, that this argument, like Respondent's prior argument regarding the validity of the Form I-9, is meritless, and no genuine issues of material fact have been shown to exist.

8 C.F.R. section 274a.2(b)(1)(ii)(B) clearly states that "an employer . . . must within three business days of hire: Complete Section 2 - 'Employer Review and Verification' on the Form I-9." Additionally, several prior IRCA decisions have confirmed the employer's obligation, under 8 U.S.C. section 1324a(b), to fully
2 of the Form I-9 and to ensure the completion
e U.S. v. Richfield Caterers, OCAHO
1990) (Failure of the employer to
oyer attestation in Section 2 and
as properly completed Section 1,
employer.); U.S. v. Manos and
)100130 (February 8, 1990) (Order
s Motion for Summary Decision) (A
e of driver's license information,
substantive defenses to issues of
evedo, OCAHO Case No. 89100397
complete any part of Section 2 of
ation.). Therefore, it is evident
nder 8 U.S.C. § 1324a(b) to check

the boxes and insert the document information in Section 2 of the Form I-9. As such, Completion of the certification at the bottom of Section 2, without more, does not constitute an affirmative defense to alleged violations of 8 U.S.C. section 1324a(b) of the Act.

D. Whether Respondent substantially complied with IRCA's employment verification requirements by attaching copies of employees' identifying documents to the Forms I-9

Respondent also argues in its Opposition/Motion for Summary Decision that, assuming an employer must check the boxes on the Form I-9, "retaining copies of the identifying documents . . ., together with the Form I-9 in the employee's personnel file comports both with the mandates of the statute and the regulation." This "substantial compliance" argument does not, however, constitute an affirmative defense to the alleged paperwork violations, as explained below. Therefore, I find that no genuine issue of material fact is presented by Respondent's fourth argument.

It has previously been held that an employer does not substantially comply with IRCA by copying employee documents and attaching them to the Form I-9, rather than filling out the Form I-9. U.S. v. Citizens Utilities Co., Inc., OCAHO Case No. 89100211 (April 27, 1990) (Decision and Order Denying Respondent's Motion for Partial Summary Decision and Granting Complainant's Motion for Partial Summary Decision). This holding is based on the finding that 8 C.F.R. section 274a.2(b)(3) only provides for the "permissive copying" of documentation, and is not an alternative method for complying with the mandatory verification and record-keeping provisions of IRCA. See U.S. v. Manos and Associates, supra; and U.S. v. Richfield Caterers, supra (An employer may copy a document presented by an individual. The regulation is supplemental to, and not inconsistent with, the mandatory reach of the regulation generally implementing 8 U.S.C. section 1324a(b).); see also Smith, et al. v. Board of Supervisors of the City and County of San Francisco, 216 Cal. App.3d 862, 875, 265 Cal. Rptr. 466 (1989); and 67 Interpreter Releases 1071 (September 24, 1990).

E. Grandfathered employees

In its fifth argument in opposition to Complainant's Motion for Summary Decision Respondent contends that four of the individuals named in the Complaint[1] are grandfathered employees since they were hired prior to the effective date of IRCA, November 6, 1986, and continuously employed by successor

[1]The four individuals Respondent claims are grandfathered are (1) Yoshiko Stacho; (2) Joan Brandon; (3) Elsie Gonzales; and (4) Cristella Cordova.

employers, and therefore it was not required to comply with IRCA's record-keeping and verification requirements with respect to those individuals. Since Complainant, in its Response to Respondent's Opposition to Motion for Summary Decision, "disputes any arguments by the Respondent that the four identified individuals had grandfathered status," and "concedes the burden of proof for the purposes of the Summary Decision cannot be met with respect to the four named individuals," I find that a genuine issue of material fact exists with respect to the four individuals Respondent alleges are grandfathered employees, and deny Complainant's Motion for Summary Decision with respect to those four individuals.

F. Good faith compliance with IRCA's employment verification requirements

Respondent's also asserts as a defense to the allegations of the Complaint that it complied in good faith with IRCA's employment verification requirements. However, as Complainant correctly states in its Response to Respondent's Opposition, good faith compliance with IRCA's verification requirements is not an affirmative defense to alleged violations of 8 U.S.C. section 1324a(a)(1)(B) for failing to comply with 8 U.S.C. section 1324a(b) of the Act. See U.S. v. Big Bear Market, OCAHO Case No. 8810038 (March 30, 1989); U.S. v. Boo Bears Den, OCAHO Case No. 89100097 (July 17, 1989); and U.S. v. USA Cafe, OCAHO Case No. 88100098 (February 6, 1989); see also 8 U.S.C. section 1324a(a)(3), which provides only that good faith compliance is a defense to violations of 8 U.S.C. section 1324a(a). Therefore, I find that no genuine issues of fact are presented by Respondent's good faith compliance "defense".

G. Mitigation of Civil Penalty

Lastly, Respondent argues that summary decision must be denied on the issue of civil penalty because Complainant has not presented any factual or legal issues with regard to fines. Although I disagree with Respondent's conclusion that Complainant has not presented any factual or legal issues with regard to fines, I agree with Respondent that Complainant's Motion for Summary Decision should be denied with respect to the issue of civil penalty, because at least two of Respondent's alleged "defenses," while not affirmative defenses to the allegations of the Complaint, raise genuine issues of material fact with respect to mitigation of penalty. Specifically, Respondent's substantial compliance and good faith compliance arguments place in dispute the mitigation factors of seriousness of the violations and good faith, respectively.

V. Ultimate Findings of Fact and Conclusions of Law

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in

opposition to the Motions for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact and conclusions of law:

(1) That, as previously found, no genuine issues of material fact have been shown to exist with respect to the individuals named in the Complaint, with the exception of the four individuals Respondent contends are grandfathered employees (Yoshiko Stacho, Joan Brandon, Elsie Gonzales, and Cristella Cordova). Therefore, pursuant to 28 C.F.R. section 68.36, Complainant is entitled to Summary Decision on the issue of liability with respect to all named individuals, except those alleged by Respondent to be grandfathered: Yoshiko Stacho, Joan Brandon, Elsie Gonzales, and Cristella Cordova.

(2) That Respondent violated 8 U.S.C. section 1324a(a)(1)(B) in that Respondent, after November 6, 1986, hired for employment in the United States the individuals named in the Complaint, excluding those named individuals alleged by Respondent to be grandfathered employees (Yoshiko Stacho, Joan Brandon, Elsie Gonzales, and Cristella Cordova), without complying with the requirements of Sections 1324a(b)(1) and (3) and 8 C.F.R. sections 274a.2(b)(1)(ii) and 274a.2(b)(2)(ii).

(3) That the remaining violations alleged in the Complaint, which are those named individuals Respondent contends are grandfathered employees (Yoshiko Stacho, Joan Brandon, Elsie Gonzales, and Cristella Cordova), present genuine issues of material fact which require an evidentiary hearing. Therefore, Complainant's Motion for Summary Decision is denied as to the remaining alleged violations.

(4) That genuine issues of material fact have been shown to exist with respect mitigation of civil penalty for all the violations alleged in the Complaint. Therefore, Complainant's Motion for Summary Decision is denied as to the civil penalty to be assessed.

(5) That, having granted Complainant's Motion for Summa Decision with respect to liability for all but four violati alleged in the Complaint and having found that genuine issue material facts exist with respect to the remaining four violations, as well as with respect to civil Respondent's Motion for Summary Decision and/or Dismiss is denied.

SO ORDERED, this 26th day of April California.

Robert B. Schneider

ROBERT B. SCHNEIDER
Administrative Law Judge

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